

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

09/10/2002

CLERK OF THE COURT  
FORM L000

HONORABLE MICHAEL D. JONES

P. M. Espinoza  
Deputy

LC 2002-000081

FILED: \_\_\_\_\_

ARTHUR ELFTMANN

SHIRLEY FOBKE

v.

STATE OF ARIZONA

ESTEBAN J GOMEZ

PHX CITY MUNICIPAL COURT  
REMAND DESK CR-CCC

MINUTE ENTRY

PHOENIX CITY COURT

Cit. No. #8968665

Charge: CONTRACTING WITHOUT A LICENSE

DOB: 12/19/44

DOC: 08/13/01

This Court has jurisdiction of this appeal by the State of Arizona pursuant to the Arizona Constitution Article VI, Section 16, and A.R.S. Sections 12-124(A) and 13-4032.

This matter has been under advisement, and this Court has considered and reviewed the record from the Phoenix City Court, and the Memoranda submitted by counsel.

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The State of Arizona appeals from an order by the trial judge denying restitution in a case where Appellee, Arthur Elftmann, was convicted (after a guilty plea) of the charge of Contracting Without a License, a class 1 misdemeanor offense, in violation of A.R.S. Section 32-1151 and 32-1164. At the time of the acceptance of the guilty plea, the trial judge denied the State's request for restitution, finding "no nexus between the crime and requested restitution."<sup>1</sup>

The controlling case concerning restitution for the crime of Contracting Without a License is State v. Wilkinson (John R. Porter, Real Party in Interest).<sup>2</sup> This court notes that the Wilkinson case was decided by the Arizona Supreme Court ten days after the trial judge (the Honorable Elizabeth Finn) had ruled in this case. The trial judge was forced to rule without guidance from the Wilkinson opinion on this restitution issue.

The Arizona Supreme Court has summarized the legal requirements that are prerequisite for a restitution order:

Section 13-603 directs the court to "require the convicted person to make restitution" to the victim, "*in the full amount of economic loss as determined by the Court....*" (citation omitted) Economic loss includes *any loss incurred by a person as a result of the commission of an offense*. Economic loss includes lost interest, lost earnings and other losses which would not been incurred *but for* the offense. Economic loss *does not include* losses incurred by the convicted person, damages for pain and suffering, punitive damages or *consequential damages*. (citation omitted) Section 13-804(B) further defines the scope of restitution by directing the court to consider "*all losses caused by the criminal offense or offenses for*

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<sup>1</sup> Tape recording of the proceedings of February 4, 2002 (C.D. 50602042002).

<sup>2</sup> 202 Ariz. 27, 39 P.3d 1131 (2002).

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which the Defendant has been convicted."  
(citation omitted)

These statutes, considered together, define those losses for which restitution should be ordered. First, the loss must be economic. Second, the loss must be one that the victim would not have incurred but for the Defendant's criminal offense. As the Court of Appeals noted, however, 'but for' causation does not suffice to support restitution, for if it did, restitution would extend a consequential damages. Yet our criminal code expressly provides the contrary. (citation omitted) By eliminating consequential damages, the statutory scheme imposes a third requirement: the criminal conduct must directly cause the economical loss.<sup>3</sup>

The Arizona Supreme Court specifically differentiated in State v. Wilkinson<sup>4</sup> between monies paid by the victims to the Defendant as part of the original contract and those losses incurred by the victims as the result of poor and unfinished work:

When (the Defendant) Porter presenting himself as a licensed contractor, entered agreements with T.S. and N.L. to provide contracting services, he violated A.R.S. Section 32-1151. As a direct result of (Defendant) Porter's offer to act as a licensed contractor, T.S. and N.L. agreed to pay, and did pay, all or a portion of the amounts due under their agreements with (Defendant) Porter. Porter's criminal actions directly caused those losses. Indeed, the original concept of restitution, and the form with the most direct link to

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<sup>3</sup>State v. Wilkinson, 202 at 28-29, 39 P.3d at 1132-33.

<sup>4</sup> Id.

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criminal conduct, is that of forcing the  
criminal to yield up to his victim the fruits  
of the crime.

. . .

A different result obtains, however, as  
to the expenses the victims incurred because  
(Defendant) Porter failed to complete the work  
he contracted to do or did so in a faulty  
manner.... Therefore, the losses incurred as  
a result of Porter's poor or unfinished work  
constitute indirect damages and cannot qualify  
for restitution.<sup>5</sup>

Applying the Wilkinson decision to the facts of the instant  
case, retrospectively, it is clear that the trial judge erred in  
denying the State's request for restitution. The trial court  
must order restitution to the victims for all monies paid to  
Appellee, Arthur Elftmann, pursuant to their agreements, as  
these monies are the "fruits of the crime."<sup>6</sup> However, losses  
incurred as a result of Appellee Elftmann's poor and unfinished  
work cannot qualify for restitution.

IT IS THEREFORE ORDERED reversing the order of the Phoenix  
City Court denying restitution in this case.

IT IS FURTHER ORDERED remanding this matter back to the  
Phoenix City Court for a restitution hearing consistent with  
this opinion, and all other future and further proceedings in  
this case.

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<sup>5</sup> Id., 202 Ariz. at 29, 39 P.3d at 1133.

<sup>6</sup> Porter had misrepresented himself as a licensed contractor to his victims,  
and the record is not clear in this case whether Appellee, Arthur Elftmann,  
made similar representations. Misrepresentation or not, the victims in this  
case should still be entitled to restitution as Appellee violated A.R.S.  
Section 32-1151 by his failure to have a contractor's license.